



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 315 OF 2018

NATIONAL UNION OF SOMALI JOURNALISTS.....PLAINTIFFS/RESPONDENT

VERSUS

MOHAMED IBRAHIM NUR.....1ST DEFENDANT/APPLICANT

VIESTINTA JA KEHITYS-SAATIO (VIKES).....2ND DEFENDANT/APPLICANT

FINNISH CHURCH AID (FCA).....3RD DEFENDANT/RESPONDENT

RULING

1. The ruling relates to a preliminary objection dated 19th September 2018, filed by the 1st and 2nd defendants (herein “the applicants”) on the ground that the court lacks the jurisdiction to hear and determine the suit and therefo

2. re the notice of motion application dated 7th August 2018 should be struck out.

3. The applicants aver that the plaintiff is a trade union that is; registered and wholly functions and based in the Republic of Somalia. It has no offices or place of business in Nairobi. The 1st defendant (herein “the Respondent”), is an official of the plaintiff based and resides in the Republic of Somalia, while the 2nd defendant is based exclusively in; Helsinki in Finland.

4. That under Article 13 of the Grant Contract Agreement (herein “the agreement”), between the European Union represented by the European Commission (herein “the contracting authority”) and the plaintiff with the 2nd defendant (herein “the coordinator”), the parties agreed on an elaborate dispute settlement process that involves conciliation before submitting the dispute to the courts of the contracting authority or to Brussels courts, if the contracting authority is; the European Commission.

5. Further the agreement provides that, the applicable law is the law of the country of the contracting authority or where the contracting authority is the European Commission; as the case herein, then the law applicable is the European Union Law supplemented as appropriate by Belgian law.

6. It was submitted that, Jurisdiction is everything. As an illustration, the same is equated to a cage and the court equated to an animal confined within the said cage. The animal can only move freely within the said cage and any effort made by the animal to leave the cage is usually with the highest form of resistance and hostility.

7. That the courts have settled the issue of jurisdiction in several cases and held that without jurisdiction a court has no power to take one more step, as held by the Supreme Court in the case of; The matter of the IEBC, Constitutional Application No. 2 of 2011

Thus any assumption of jurisdiction by courts in Kenya; is a subject regulated by the Constitution, statute law, and by principles laid out in judicial precedent.

8. Further reference was made to the classic decision of the Court of Appeal in the case of; Owners of Motor Vessel “Lillian S” vs Caltex Oik (Kenya) Limited (1989) KLR 1, where Nyarangi, JA (as he then was) stated that; “ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

9. It was argued that this case establishes that; jurisdiction flows from the law and the recipient, the court is to apply the same with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft interpretation, or by way of endeavors, to

discern or interpret the intentions of Parliament, where the working of legislation is clear and there is no ambiguity. In that case the jurisdiction of the superior courts is donated by the Constitution of Kenya, 2010.

10. The case of *Reytheon Aircraft Corporation & Another vs Air Al-Farat Limited (2005) 2 KLR 47*, was also cited where the court stated inter alia that:-

“the first appellant, Raytheon, is a foreign corporation incorporated under the laws of Kansas, USA, and having its registered office in Kansas. It was not trading within the jurisdiction by a subsidiary company at the time it was sued and it is not domiciled in Kenya. In such a case, the High court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is the nature specified in order V rule 21(e) Civil Procedure Rules, that is, inter alia, the contract is made in Kenya, if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya. The High court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under order V rule 23 and after such summons in accordance with the machinery stipulated therein.”

11. That the Court in that case then held that; if the High Court assumes jurisdiction over a foreign defendant by granting leave to serve summons or notice of summons outside Kenya, the foreign defendant is still entitled to challenge the jurisdiction in relation to any matter arising from a contract unless the contract is made in Kenya, or if it is governed by the laws of Kenya: or if a breach of the contract is committed in Kenya, which factors was not applicable to the subject contract.

12. That the Court of Appeal while quoting the above case in; *W K, M W K (both suing as the administrators of the Estate of Dr. W. K & Another vs British Airways Travel Insurance & Another (2017) eKLR*, upheld the decision of the High Court which held that it had no jurisdiction to hear and determine the suit that had been filed before it by the appellant, thus upholding the preliminary objection and striking out the suit with costs.

13. The applicants herein urged the court that; in determining the question of jurisdiction herein it should begin by considering the location of the parties or their registered offices, places of residence, whether they have any place of business in Kenya and whether the agreement between the parties makes out a case for Kenya as dispute resolution destination.

14. The applicant reiterated that it is not in dispute that none of the parties in the dispute are resident or has a place of business in Kenya; neither does the agreement which forms the substance of the dispute make out a case in favour of Kenya as a dispute resolution forum, consequently the preliminary objection should be allowed.

15. However, the plaintiff in response to the application argued that the preliminary objection as raised by the applicants does not lie for reason that, it is not a pure point of law as enunciated in the case of; *Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A. 696*, where the Court of Appeal stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial association.”

16. Further, Section 15 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, governs the appropriate place to institute civil suits and provides as follows:-

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) The defendant or each of the defendants (where there are more than one) at the time of commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) Any of the defendants (where there are more than one), at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain provided either the leave of the court is given, or the defendants who do not reside or carry on business or personally work for gain, as aforesaid acquiesce in institution; or

(c) The cause of action, wholly or in part, arises. Explanation (i) – where a person has a permanent dwelling at one place and also temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

17. That the plaintiff in the instant matter avers at paragraph 2 of the plaint that, that the 1st defendant is a Somali citizen who operates in the Republic of Kenya and similarly the 2nd defendant is described as based in Nairobi. That the 1st defendant engages foreign embassies and donors in Nairobi, Kenya for fund raising. This is rebutted by the 1st and 2nd defendants' assertion in paragraph 4 of their statement of defence, where the 1st defendant avers that, he is the legally elected and legally recognized Secretary General of the plaintiff. As such this is a contested issue.

18. Further, at paragraph 15 of the plaint, and which is the main cause of the plaintiff's claim, it is pleaded that it has come to the attention of the plaintiff that the 1st defendant has been meeting donors with the help of the 2nd defendant in Nairobi..... The averment is also denied by the 1st and 2nd defendants at paragraph 34 of their joint statement of defence.

19. In the same vein, whereas the plaintiff avers in paragraph 2 of his plaint that the 2nd defendant is a Non-Governmental Organization from

Finland working Kenya and Somalia with their liaison offices domiciled in Kenya, the 2nd defendant at paragraph 5 of their joint defence avers in denial that it has no office and no representation in Kenya.

20. The plaintiff maintained that, the cause of action arose in Nairobi as pleaded at paragraph 15 of the plaintiff. That further it is pleaded at the same paragraph that; the 1st and 2nd defendants in collusion with rogue elements misrepresented that, the 1st defendant is the currently elected Secretary General of the plaintiff and agreed to channel lobbied funds and resources, applied in and secured from; European Union Mission based in Nairobi to engage in capacity initiatives through the 1st defendant in the name of the plaintiff....This averment is similarly rebutted in paragraph 34 of the 1st and 2nd defendants statement of defence dated 11th October 2018.

21. Finally at paragraph 16(c) of the plaintiff, the Secretary General to the plaintiff, Omar Farouk Osman, states he has trade marked the plaintiff's name, as a trade mark No. 90595 and 90596, in Kenya under the Trade Marks Act, Cap 506, of the Laws of Kenya. The assertion has been rebutted at paragraph 35 of the 1st and 2nd defendants' statement of defence.

22. The plaintiff thus argued that all the foregoing are live and/or contested issues for determination and can only be resolved through evidence to determine inter alia; where the cause of action arose and the domicile of the parties and consequently ascertain if; the courts of Kenya have jurisdiction to hear and determine the matter. That on that basis alone the preliminary objection raised by the 1st and 2nd defendants fails on its own.

23. I have considered the rival arguments and/or submissions herein and in particular the agreement entered into by the parties and I find that, Article 13 thereof; makes provision for the applicable law in dispute settlement. It states that, "the contract shall be governed by the law of the contracting authority or where the contracting authority is the European Commission, by the European Union Law supplemented as appropriate by Belgian Law. That, the parties shall do everything possible to settle amicably any dispute arising between them during the implementation of the contract". Thus the appropriate court envisaged in the contract is clear; being the court of the country of the contracting party or the Brussels courts where the contracting authority is; the European Commission.

24. The agreement herein clearly indicate that it is between the European Union, represented by the European Commission (the contracting authority) of the one part and VIKES (herein "the coordinator") and NUSOJ, (who have conferred power of the attorney for the purpose of signature to the agreement to the coordinator) and collectively referred to as "Benefici(es)" of the other party. The suit herein is between NUSOJ and VIKES. The 1st and 3rd defendants are not parties to the subject contract.

25. Having gone through the pleadings, in particular the contents of the plaintiff, it is evident the main claim is against the 1st and 2nd defendants for allegedly using the plaintiff's name without authority, soliciting for funds in the plaintiff's name and embezzling the donor sourced funds. Therefore the entire plaintiff is not purely based on the subject agreement and does not just involve the parties to the grant contract only.

26. In that regard, it suffices thus to note that the European Union, represented by the European Commission, is not a party to this suit. The suit is between two parties being; the NUSOJ and VIKES, who are both parties on one part to the grant contract and/or agreement. Similarly the 3rd defendant is not a party to that contract. Therefore the provisions of article 13 of the said contract apply do not apply to none parties to the contract. In fact those provisions can only apply if the dispute is between the parties thereto.

27. The issue to consider therefore is whether the court has jurisdiction. In determining the same I find that, the plaintiff is described in the plaintiff as a registered Trade Union for Media Workers; working within the Republic of Somalia and has member journalists in Kenya. The 1st Defendant is described as a Somali citizen operating and engaging in business in Kenya. The 2nd and 3rd defendants are described as Non-Governmental Organizations from Finland working in Kenya and Somalia. Therefore each party herein is connected either through official business or by domicile in Kenya.

28. However, as aforesaid the 1st and 2nd defendants state in the defence filed on 7th November 2018, that the NUSOJ is a registered Trade Union for Media Workers or Journalists in the Republic of Somalia with headquarters in Mogadishu. But I note that the defendants do not expressly deny averments in the plaintiff that describe them as having business in Kenya.

29. It is also noteworthy that, the 3rd defendant filed a replying affidavit sworn by Ruth Wamugi on 23rd August 2018 opposing the application dated 7th August 2018 and averred that the 3rd defendant operates exclusively within the Republic of Kenya and does not operate or fund projects outside Kenya.

30. From all these averments, it is clear that, the dispute herein relate to the legitimate office bearers of the plaintiff's organization. It is alleged by the 1st and 2nd defendants that the dispute has been handled by various authorities in the Republic of Somalia; therefore this matter should be heard there. Unfortunately no evidence has been availed to that effect.

31. The Applicant opted to file a preliminary objection which is founded on pure points of law. No evidence can be led on the same, but have made allegations that will require evidence. Issues such as; similar disputes registered and handled in Somali is not a pure issue of law.

32. For all the reasons stated herein, I decline to uphold the preliminary objection as prayed. I however order that the costs to abide the outcome of the suit.

33. It is so ordered.

Dated, delivered and signed in an open court this 4th day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Wairimu for Mr. Kihingo for the Plaintiff

Mr. Simiyu for Mr. Ongoya for 2nd defendant

Ms. Anyango for Mr. Ouma for the 1st defendant

DennisCourt Assistant